

**U.S. PTO Customer No. 25280****Case No. 2127B****REMARKS**

Claims 73 and 75 have been amended to more clearly define Applicant's invention. Applicant respectfully traverses all art rejections of Claims 73-83. Applicant hereby requests further examination and reconsideration of amended Claims 73-83 for the reasons set forth below.

**Formal Matters****Rejections Under 35 U.S.C. §112**

Claim 75 was rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The Examiner states "Claim 75 recites "the interior surface of said bag has a maximum average Kawabata surface friction value of about 0.25." Claim 75 depends upon claim 73, which does not positively recite a bag structure. Claim 73 recites a textile composite that is used for constructing bags. Claim 75 is confusing because it is reciting limitations to an interior surface of a bag, but there is no bag structure in the claims."

Applicants, with this Response, have amended Claims 73 and 75 to recite the construction of a bag from the claimed composite.

**Nonstatutory Double Patenting**

The Examiner states "Claims 73-83 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 37-50 of U.S. Patent No. 6,381,870 to Kohlman et al. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims are directed to a textile composite comprising a textile substrate with a polymer facing and similar stiffness property values."

Applicants respectfully traverse this rejection. The basis of this obviousness-type double patenting rejection is the assertion that the subject matter of Claims 73-73 in this application is merely an obvious variant of the subject matter of the claims in U.S. Patent No. 6,381,870. However, the '870 patent is the parent to this application; the Examiner in that case imposed a restriction requirement and required an election from among several groups, one of which were the Claims 73-83 that are under examination

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here. The position of the U.S. Patent and Trademark Office at that time was that Claims 73-83 constituted a separate electable Group that, if pursued, should be done so in a divisional application. Applicants respectfully assert that the U.S. Patent and Trademark Office cannot at one time treat Claims 73-83 as representing a distinct and separate invention from the Claims of the '870 patent and at another treat Claims 73-83 as merely an obvious variation of those same claims. Accordingly, Applicants respectfully request reconsideration and withdrawal of this rejection.

**Art Rejections Based on 35 U.S.C. §102 and/or §103**

As asserted by the Examiner, "Claims 73-80 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Feitlowitz (U.S. Patent No. 3,809,573). Feitlowitz discloses a method for imparting increased stiffness to woven and nonwoven fabrics (column 1, lines 15-27). Feitlowitz teaches thoroughly impregnating the fabric with a polymeric composition (column 2, lines 42-49). The Examiner asserts that it is reasonable to presume that the presently claimed properties are inherent to the Feitlowitz fabrics, and attempts to find support for this presumption in Applicants' use of like materials (i.e., woven and nonwoven fabrics) and the use of like processes (i.e., impregnating with a stiffening polymer). The Examiner then asserts that the burden is upon applicant to prove otherwise, citing *In re Fitzgerald*, 204 USPQ 594.

In the alternative, the Examiner asserts that the presently claimed properties would obviously have been provided by the process disclosed by Feitlowitz since Feitlowitz teaches adjusting the stiffness level. The Examiner notes that, with regard to Claim 79, the textile substrate is polyester (claimed by Feitlowitz), and with regard to Claim 80, Feitlowitz teaches the polymer thoroughly impregnates the fabric, so (according to the Examiner) the polymer would form anchoring structures. The Examiner cites *In re Best*, 195 USPQ433 in supporting this position. Therefore, the Examiner concludes that claims 73-80 should be rejected as being anticipated by, or obvious over, Feitlowitz.

Applicants respectfully traverse these rejections. With respect to the assertion of inherency in the context of this rejection, Applicants respectfully assert that, to establish inherency, the extrinsic evidence "...must make clear that the missing descriptive matter is *necessarily* present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient." *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (emphasis added).

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Specifically concerning the assertion by the Examiner that the burden of showing that the claimed properties would not be found in products resulting from the teachings of Feitlowitz has shifted to Applicants, in order for the burden to shift, the Examiner must present objective evidence or cogent technical reasoning tending to show that the allegedly inherent characteristics necessarily flow from the teachings of the prior art. Applicants respectfully assert that the teachings of Feitlowitz fall far short of providing such support.

Feitlowitz appears to be limited to the application (specifically, the thorough impregnation) of a specific set of stiffening compositions to 100% polyester fabrics. The resulting fabric is "very stiff" and requires moderation of that stiffness through the use of a "button breaker." In view of the generally dissimilar materials and clearly dissimilar processes (thus dispelling any assumption of inherency grounded on the notion of "like fabrics and like processes"), Applicants respectfully argue that any assertion by the Examiner that the fabrics of Feitlowitz would have exhibited the stiffness and smoothness qualities claimed by Applicants is pure conjecture on the part of the Examiner. Accordingly, Applicants respectfully assert that the Examiner has not met the requirements of the MPEP concerning inherency, and the burden has not shifted.

The Examiner further has rejected Claims 73-79 and 81 rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Cross et al. (U.S. Patent No. 5,534,298). According to the Examiner, Cross et al. disclose a stiff woven fabric with a polymeric coating (Abstract). The Examiner argues that, although Cross et al. do not explicitly teach the limitations of Kawabata stiffness values or Kawabata surface friction values, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. textile composition) and in the similar production steps (i.e. coating with a stiffening polymer) used to produce the fabric. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed stiffness values would obviously have been provided by the process disclosed by Cross et al. since the reference teaches providing varying levels of stiffness (column 5, lines 27-39). Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. With regard to claims 79 and 81, the woven textile substrate may be 150 denier polyester (column 5, lines 7-26) and the coating is pressed into the fabric interstices (column 6, lines 4-6).

Applicants respectfully traverse this rejection, for the reasons directed to inherency set for above in connection with the Feitlowitz reference. It is clear that the process taught by Cross et al. is that of the application of an aerated or foamed latex compound to a fabric in a manner that does not result in the penetration of the compound to the opposite side of the fabric (see Col. 3, Lines 34-36). Applicants are

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not limited to the use of a specific application method (and, in fact, teach methods other than use of foams), and are keenly interested in the smoothness of the composite surface, a consideration that appears to be of little or no importance to Cross et al. Accordingly, Applicants believe that dissimilar materials and processes are both present, and there is no reason to presume any inherent characteristics to the structures taught by Cross et al, and, particularly, no reason to presume any specific range of surface friction values.

**Art Rejections Based on 35 U.S.C. §103**

Claims 81 and 82 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Feitlowitz in view of Scholz et al. (U.S. Patent No. 6,159,877). Feitlowitz does not disclose the denier size of the yarn or the fabric to be warp knitted. Scholz et al. teach a fabric with a controlled stiffness useful as an orthopedic support material (column 2, lines 45-60). Scholz et al. disclose manufacturing a woven or warp knitted fabric (column 7, line 57 —column 8, line 21) with a yarn denier of less than 500 (column 8, lines 35-36). It would have been obvious to a person having ordinary skill in the art at the time of the invention to use the fabric disclosed by Scholz et al. in the invention of Feitlowitz in order to provide a fabric material that is useful as an orthopedic support, as taught by Scholz et al.

Applicants respectfully traverse this rejection. Claims 81 and 82 are each dependent from Claims 79 and 73. Applicants believe the shortcomings of Feitlowitz with respect to Claims 79 and 73 have been amply discussed above. The teachings of Scholz et al. can do nothing to address those shortcomings. Therefore, the combination of Feitlowitz and Scholz et al. are believed to be no more relevant to Claims 81 and 82 than that of Feitlowitz et al. alone. Additionally, Applicants respectfully assert that the Scholz et al. disclosure is directed to fabrics intended for use as orthopedic casting materials, having stiffness characteristics that are adapted to utterly immobilize a flexible body part and therefore far exceed those taught, required, or claimed by Applicants. Applicants therefore believe that there is a total absence of any teaching in Scholz et al that would lead one of ordinary skill to combine these references, and no indication that, even if combined, the result would meet the cumulative limitations of dependent Claims 81 and 82.

Claim 83 is rejected under 35 U.S.C. 103(a) as being unpatentable over Feitlowitz in view of Drelich et al. (U.S. Patent No. 3,889,024). The Examiner reasons that, although Feitlowitz discloses making a nonwoven fabric (column 1, line 45), Feitlowitz does not teach the length of the fibers. Drelich et al., however, teaches that nonwoven fabrics are conventionally made from fibers having a length between 0.5 and 2.5 inches (column 2, lines 36-40). Therefore, according to the Examiner, absent any specific

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teaching by Feitlowitz as to the length of the fibers, it would have been both necessary and obvious for a person of ordinary skill in the art to use fibers with a length that is conventional in the art of nonwoven fabrics. Applicant's claimed fiber length range falls within what is conventional in the art for nonwoven fabrics.

Applicants respectfully traverse this rejection. The shortcomings of Feitlowitz with respect to the subject matter of Claim 73 and 79, from which the subject matter of Claim 83 cumulatively depends, have been discussed above, and apply here as well. The teachings of Drelich et al. utterly fail to address these shortcomings. Therefore, the combination of Feitlowitz and Drelich et al. are believed to be no more relevant to Claim 83 than that of Feitlowitz et al. alone.

### **CONCLUSION**

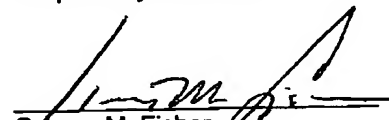
For the reasons set forth above, it is respectfully submitted that Claims 73-83 now stand in condition for allowance. Such action is earnestly solicited.

A Three Month Request for Extension of Time accompanies this Response. In the event that there are additional fees associated with the submission of these papers (including extension of time fees), authorization is hereby provided to withdraw such fees from Deposit Account No. 04-0500.

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